Filed 4/16/19 P. v. Garza CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS GARZA,

Defendant and Appellant.

F074950

(Super. Ct. No. F16901454)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan M. Skiles, Judge.

Gregory M. Chappel, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Jennifer Oleksa, Deputy Attorneys General, for Plaintiff and Respondent.

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Nicholas Garza (defendant) stands convicted, following a jury trial, of stalking with a restraining order in effect and in the commission of which he personally used a firearm (Pen. Code,[1] §§ 646.9, subd. (b), 12022.5, subd. (a); count 1); stalking, in the commission of which he personally used a firearm and following two prior felony convictions for domestic violence (§§ 646.9, subd. (a), 12022.5, subd. (a); count 2); discharging a firearm with gross negligence, in the commission of which he personally used a firearm (§§ 246.3, subd. (a), 667, 1192.7; count 3); possession of a firearm by a felon (§ 29800, subd. (a)(1); count 4); contempt of court by willful disobedience of a protective order issued as a condition of postrelease community supervision (§ 166, subd. (c)(1); count 5); and possession of methamphetamine for sale (Health & Saf. Code, § 11378; count 6). Through a combination of admissions and jury findings, defendant was determined to have served three prior prison terms (§ 667.5, subd. (b)) and suffered two prior convictions for drug sale offenses (Health & Saf. Code, § 11370.2, subd. (c)). He was sentenced to a total of 15 years 8 months in prison, and the trial court found an inability to pay fees and fines. We hold: (1) The complaining witness's preliminary hearing testimony was properly admitted, but (2) the matter must be remanded for resentencing due to statutory amendments that took effect while this appeal was pending.

FACTS

J. had known defendant, her soon-to-be ex-husband and the father of her children, for 22 years.[2] He was abusive toward her during their entire relationship. She had known him to have several guns. In 2013, he physically assaulted her and was sent to prison. While incarcerated in 2015 and 2016, he tried to contact her by phone and mail.

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1 All statutory references are to the Penal Code unless otherwise stated.

2 For the sake of privacy, we refer to some individuals by their first names and/or initials. No disrespect is intended.

J.'s preliminary hearing testimony was read to the jury, as discussed in more detail, *post*.

She learned he was released from custody in 2016 when he "accepted his self on [her] Facebook" account. He called her several times from a number that showed as "private." She felt nervous and scared when she learned he was out of custody. She did not want to see him, so she tried to hide by going where he would not find her.

On the evening of February 21, 2016, J. was at the home of her friend, Juanita V., in Fresno, when she received a phone call from defendant.[3] J., who was on her cell phone in front of the residence, stated to defendant that she had told him she did not want to be with him, that it was over, and there was no reason for her to see him. She hung up.

J. walked inside Juanita's residence, then right back out because she heard defendant making a "commotion" outside.[4] Defendant had walked up to the house and was standing in front of the door. J. told him she did not want to be with him. Defendant did not say anything, but fired a handgun into the air about six times. He then pointed the gun at J. and told her, "You already know, bitch."

J. told defendant she was calling the police. She went inside the house to get her cell phone from her purse. Defendant left in a blue car with perhaps two other people who had been standing outside the car while this was going on. J. grabbed her phone, then left the house because she was scared. She went to her cousin's house across the street and called the police while hiding behind a truck.

J. called 911 at approximately 7:10 p.m. In the call (a recording of which was played for the jury), J. related that her husband, against whom she had a restraining order, had just fired seven shots into the air, then pointed the gun at her and pulled the trigger, but the gun was empty. J. related that defendant had gotten out of a blue Dodge Charger "full of people." She "duck[ed] behind" a white truck at the end of Fay and McKinley.

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3 Further references to dates throughout this opinion are to the year 2016, unless otherwise specified.

4 At trial, the defense presented two alibi witnesses for the time in question.

A neighbor of the residence where the incident occurred also called 911. The neighbor heard six shots, then tires immediately squealing.

At approximately 7:12 p.m., Fresno Police Officer Manning was dispatched to an address in the 1500 block of Fay Avenue, in response to a report of shots fired in regard to a domestic event. There, he spoke with J., who appeared terrified. She was crying and shaken. Her voice was shaking, and she was looking around a lot. Six expended cartridge casings were found in the front yard of the residence, indicating a semiautomatic handgun was used.

Around 1:00 p.m. on March 2, Fresno Police Officer Baroni and other officers were conducting surveillance on a location near Palm and Olive. Baroni observed a blue Chevrolet Monte Carlo that J. had described as being in defendant's possession. After approximately 15 minutes, Baroni saw defendant exit the garage of the residence. Defendant was carrying a backpack, which he placed in the vehicle's trunk. Defendant returned to the garage for two to three minutes, then came back out. When defendant was just about to open the driver's door of the vehicle, officers sought to apprehend him. Defendant fled back into the garage, then surrendered by lying on the ground. He was taken into custody. Cash totaling $1,452 was found in his pocket.

On the ground near where defendant had been, Baroni located a clear plastic bag containing 7.198 grams of a substance containing methamphetamine, a black Alcatel cell phone, and a key fob with a key for the Monte Carlo. Baroni did not find any paraphernalia that typically would be used for ingesting methamphetamine, and defendant did not appear to be under the influence of any narcotic.

Baroni then searched the vehicle. Inside the backpack in the trunk were paperwork for defendant and a digital scale. There was a box of sandwich bags in the corner of the trunk. No gun was located anywhere. An iPhone was located either in defendant's pocket or in the backpack.

Data extraction subsequently was performed on the iPhone, which contained incoming messages that referred to defendant by name as well as photographs of him. The data extraction revealed numerous messages sent to J.'s phone between February 18 and February 21.[5] With one possible exception, there were no messages from J.'s phone after 7:00 p.m. on February 21.

When Fresno Police Detective Scott interviewed defendant the day after the arrest, defendant was very emotional. He outlined a long-term relationship in which he was very connected to J. He said he was having a hard time with a recent separation and that he loved her. Defendant said the narcotics in his possession were for personal use, as he was using them as a coping mechanism for dealing with the pain of the separation. Defendant acknowledged there was a criminal protective order in existence.[6]

DISCUSSION

I

J.'S PRELIMINARY HEARING TESTIMONY WAS PROPERLY ADMITTED.

Defendant contends the trial court erred in finding the prosecution exercised reasonable diligence in attempting to locate J. and obtain her presence at trial. As a result, he says, J. was not legally unavailable as a witness; therefore, her preliminary hearing testimony should not have been admitted. Defendant says the error violated his federal and state constitutional due process and confrontation rights and cannot be found harmless. We conclude the prosecution demonstrated reasonable diligence.

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5 The contact name for J.'s phone was "no good bitch."

6 The trial court took judicial notice of the fact that on February 21, 2015, defendant was served with a restraining order. That same date, a criminal protective order was issued that prohibited defendant from having any contact with J. The order was valid through February 21, 2018, and was issued as a result of defendant's conviction in a felony domestic violence case. The court further took judicial notice of the fact defendant was convicted of domestic violence on May 14, 1998; May 9, 2000; January 17, 2001; and July 13, 2015; and that he was convicted of "a misdemeanor form of domestic violence" on May 18, 1999.

A. Background

The record before us shows J. testified at the preliminary hearing on March 18. On May 26, the case was terminated and reinstated pursuant to section 1387.2.[7] Defendant waived his right to a preliminary hearing after the reinstatement, and jury trial was tentatively set for July 7. On June 28, witness call was set for July 7, while trial was set for July 14. J. was not present on July 7. A body attachment was issued and held, at the prosecution's request, until July 14. On July 14, trial was continued to July 20. The court ordered that the body attachment issue as to J.

Trial began on July 20. The People requested to be allowed to read J.'s preliminary hearing testimony to the jury. Defendant requested an Evidence Code section 402 hearing concerning whether the People exercised due diligence to secure J.'s attendance at trial. The hearing was held that afternoon.

Janette Cantu, a senior investigator in the domestic violence unit of the district attorney's office, testified that she had spoken with J. many times. When they spoke in March, J. was fairly cooperative with the investigation and provided Cantu with some printouts that potentially were relevant to the case. J. expressed some reluctance to go to court. She commented that if she testified, "people on the streets" would know this, and she was concerned about safety. Cantu affirmed that victim services could house her and that there were other services that could be provided.

In May or thereabouts, J. contacted the district attorney's office for an update on what happened in court. During the call, J. remarked that she had a gun for which someone else was being blamed, and she knew she was not supposed to have a gun because she was a convicted felon. Cantu obtained information about the person to whom J. was referring, then contacted the deputy district attorney assigned to that

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[7] The record does not reflect the reason.

person's case to pass along that information. When speaking with Cantu, J. made comments that she "could get really fucked up" for giving information about the incident.

Cantu last had contact with J. on June 8, when she served J. with a subpoena for the July 7 court date. Cantu had been unable to contact J. since July 7. Cantu had attempted to contact her via cell phone, by calling her and text messaging her at the same phone number at which Cantu had contacted J. "very recently." Since July 7, Cantu had gone to six addresses in an attempt to contact J. Five of the addresses belonged to family members of J., and the sixth was an address listed in "the report."[8] Cantu also went to different areas in which she had previously contacted J.

After July 14, the date until which the body attachment had been held, Cantu believed a body attachment had been issued for J. She attempted to contact J. after that date, including through J.'s Facebook page. J. never contacted her back. Cantu unsuccessfully checked to see whether J. was in the county jail, and contacted multiple area hospitals to see if J. was registered or hospitalized. Cantu also contacted a couple of J.'s friends and someone J. was seeing, but all said they did not know her whereabouts. Cantu looked into public assistance and went to an address as a result, but J. was not there.

On the morning of July 20, Cantu checked to see whether a body attachment had issued for J. There was no warrant in the Fresno County system or in Odyssey.

At the conclusion of the hearing, the court noted that according to its case file, the judge ordered that the body attachment issue on July 14. Somehow, apparently as the result of an error by the court, the warrant did not make it into the computer, a problem that was corrected on July 20. The court found Cantu's efforts to locate J. qualified as due diligence, and it ruled the People could present J.'s preliminary hearing testimony in

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8 Cantu did not specify the nature of the report. That report also listed a second address, but Cantu did not attempt contact there because she knew, as the result of a past case in which she had gone to that address, that J. did not live there.

light of J.'s unavailability. The court noted Cantu believed the warrant was in the system and acted in accordance with that belief, and it impliedly rejected defense counsel's argument that had J. been taken into custody based on her statement about possessing a gun, it would have been more likely that she would have been available for defendant's trial.

B. Analysis

"The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. [Citations.] That right is not absolute, however. An exception exists when a witness is unavailable and, at a previous court proceeding against the same defendant, has given testimony that was subject to cross-examination." (*People v. Cromer* (2001) 24 Cal.4th 889, 892 (*Cromer*); see *Crawford v. Washington* (2004) 541 U.S. 36, 68; *Barber v. Page* (1968) 390 U.S. 719, 722.)

A similar exception exists under this state's hearsay rules. Thus, Evidence Code section 1291, subdivision (a) provides in part: "Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] . . . [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." A declarant is unavailable as a witness if, inter alia, he or she is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).)[9] A finding of witness unavailability under this statute satisfies the unavailability requirement of *Crawford*. (*People v. Byron* (2009) 170 Cal.App.4th 657, 671.)

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[9] For purposes of this provision, " 'reasonable diligence' " is often referred to as "due diligence." (*Cromer, supra,* 24 Cal.4th at p. 892.)

The proponent of former testimony — here, the prosecution — has the burden of proving unavailability of the witness by a preponderance of the evidence. (*People v. Williams* (1979) 93 Cal.App.3d 40, 51, disapproved on another ground in *Coito v. Superior Court* (2012) 54 Cal.4th 480, 499; accord, *People v. Christensen* (2014) 229 Cal.App.4th 781, 790.) "[T]o establish unavailability, the prosecution must show that its efforts to locate and produce a witness for trial were reasonable under the circumstances presented. [Citations.]" (*People v. Herrera* (2010) 49 Cal.4th 613, 623.) "The obligation to use reasonable means to procure the presence of the witness has two aspects. The more obvious is the duty to act with due diligence in attempting to make an absent witness present. Less obvious, perhaps, but no less important 'is the duty to use reasonable means to prevent a present witness from becoming absent.' [Citation.]" (*People v. Louis* (1986) 42 Cal.3d 969, 991.)

What constitutes due diligence depends on the facts of the individual case, and the totality of the proponent's efforts to achieve presence of the witness must be considered. (*People v. Sanders* (1995) 11 Cal.4th 475, 523.) "[T]he term 'due diligence' is 'incapable of a mechanical definition,' but it 'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.' [Citations.] Relevant considerations include ' "whether the search was timely begun" ' [citation], the importance of the witness's testimony [citation], and whether leads were competently explored [citation]." (*Cromer, supra,* 24 Cal.4th at p. 904; accord, *People v. Wilson* (2005) 36 Cal.4th 309, 341.) "We review the trial court's resolution of disputed factual issues under the deferential substantial evidence standard [citation], and independently review whether the facts demonstrate prosecutorial good faith and due diligence [citation]." (*People v. Herrera, supra,* 49 Cal.4th at p. 623; see *Cromer, supra*, 24 Cal.4th at pp. 902-903.)

There is no doubt J. was a very important witness with respect to the prosecution's case, and she expressed some reluctance to go to court. Nevertheless, she appeared for

the preliminary hearing and was locatable, so as to be served with a subpoena, within a month of the July 7 date upon which she was supposed to appear. (Cf. *People v. Avila* (2005) 131 Cal.App.4th 163, 169.) There was no evidence to suggest she would not appear at trial. (See *People v. Wise* (1994) 25 Cal.App.4th 339, 344; cf. *People v. Louis*, *supra*, 42 Cal.3d at p. 992.) When J. did not appear, the prosecution took timely and reasonable steps to locate her. (See *People v. Lopez* (1998) 64 Cal.App.4th 1122, 1128; *People v. Wise*, *supra*, 25 Cal.App.4th at p. 344.)

That the body attachment was delayed was not the prosecution's fault, and defendant does not persuade us Cantu's failure to confirm the warrant was in the system demonstrates lack of concern and effort. Defendant also fails to persuade us it was unreasonable for the prosecutor to request that the attachment be held a week despite J.'s earlier admission she had unlawfully possessed a firearm at some point and her expressed reluctance to testify. There was no evidence the prosecution had reason to believe there was a substantial risk J. would disappear, particularly since Cantu was able to locate her some period of time after J. made the admission and expressed concern. "The prosecution is not required 'to keep "periodic tabs" on every material witness in a criminal case . . . .' [Citation.] Also, the prosecution is not required, absent knowledge of a 'substantial risk that this important witness would flee,' to 'take adequate preventative measures' to stop the witness from disappearing. [Citation.]" (*People v. Wilson*, *supra*, 36 Cal.4th at p. 342.)

Following our independent review, we conclude the prosecution bore its burden of establishing constitutionally adequate diligence in its attempts to procure J.'s attendance at trial. "Defendant's contention that the People should have done more . . . is irrelevant to our analysis. 'That additional efforts might have been made or other lines of inquiry pursued does not affect [our] conclusion. . . . It is enough that the People used reasonable efforts to locate the witness.' [Citations.]" (*People v. Wise*, *supra*, 25 Cal.App.4th at

p. 344; see, e.g., *People v. Fuiava* (2012) 53 Cal.4th 622, 677; *People v. Andrade* (2015) 238 Cal.App.4th 1274, 1294.)

II

THE MATTER MUST BE REMANDED FOR RESENTENCING.

At the time defendant was sentenced, Health and Safety Code section 11370.2, subdivision (c) provided, in pertinent part: "Any person convicted of a violation of . . . [Health and Safety Code] Section 11378 . . . shall receive, in addition to any other punishment authorized by law, including Section 667.5 of the Penal Code, a full, separate, and consecutive three-year term for each prior felony conviction of . . . [Health and Safety Code] Section . . . 11378, . . . [or] 11379, . . . whether or not the prior conviction resulted in a term of imprisonment." Defendant had two such prior convictions, resulting in the trial court adding six years to the sentence imposed on count 6.

In addition, section 12022.5, subdivision (c) provided: "Notwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." Accordingly, the trial court imposed the middle term for the section 12022.5, subdivision (a) enhancement on counts 1 and 2, although it stayed execution of sentence on count 1 pursuant to section 654.

Effective January 1, 2018, Health and Safety Code section 11370.2, subdivision (c) was amended, by Senate Bill No. 180, to provide that the enhancement applies only in cases in which the prior conviction was for a violation of Health and Safety Code section 11380. (Stats. 2017, ch. 677, § 1.) Effective that same date, section 12022.5, subdivision (c) was amended, by Senate Bill No. 620, to give trial courts discretion, pursuant to section 1385, to strike or dismiss a firearm enhancement otherwise required to be imposed under section 12022.5. (Stats. 2017, ch. 682, § 1.)

The Attorney General concedes these amendments apply to defendant. He says the two Health and Safety Code section 11370.2, subdivision (c) enhancements must be stricken, and defendant is entitled to have the trial court exercise its discretion whether to strike or dismiss either or both of the section 12022.5 enhancements. We agree.

We also agree with the Attorney General that, upon remand, the trial court shall be entitled to reconsider all of its sentencing decisions. "When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.] This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components. The invalidity of one component infects the entire scheme. [Citation.]" (*People v. Hill* (1986) 185 Cal.App.3d 831, 834.) Thus, "when part of a sentence is stricken on review, on remand for resentencing 'a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.' [Citations.]" (*People v. Buycks* (2018) 5 Cal.5th 857, 893.)[10]

[10] This rule is, of course, subject to any constraints imposed on the length of the aggregate term by the constitutionally mandated prohibition against double jeopardy. (See *People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1311-1312.)

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated, and the matter is remanded to the trial court with directions to strike the Health and Safety Code section 11370.2, subdivision (c) enhancements, exercise its discretion pursuant to Penal Code section 12022.5, subdivision (c), and resentence defendant in accord with the views expressed in this opinion.

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DETJEN, Acting P.J.

WE CONCUR:

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MEEHAN, J.

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DESANTOS, J.